SUPREME COURT, U. S.

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1970

No. 1197

PASSAIC COUNTY BAR ASSOCIATION, a non-profit, membership corporation of the State of New Jersey, NEWTON M. ROBNER and WILLIAM J. MARCHESE,

Petitioners,

vs.

RICHARD J. HUGHES, The Governor of the State of New Jersey, and FRANK X. McDERMOTT, The President of the Senate of the State of New Jersey, and THE MEMBERS OF THE SENATE OF THE STATE OF NEW JERSEY—ROBERT E. KAY, FRANK S. FARLEY, JOHN L. WHITE, HUGH A. KELLY, JOHN L. MILLER, FRANK C. ITALIANO, WILLIAM T. HIERING, EDWIN B. FORSYTHE, ALFRED N. BRADLEYSTON, RICHARD R. STOUT, RICHARD J. COFFEE, SIDO L. RIDOLFI, J. EDWARD CRABIEL, JOHN A. LYNCH, NORMAN TANEMAN, RAYMOND H. BATEMAN, NICHOLAS S. LA CORTE, MATTHEW J. RINALDO, JOSEPH J. MARAZITI, HARRY L. SEARS, GERARDO L. DEL TUFO, DAVID W. DOWD, MICHAEL A. GIULIANO, ALEXANDER J. MATTURRI, MILTON A. WALDOR, JAMES H. WALLWORK, FRANK J. GUARINI, Jr., FREDERICK H. HAUSER, WILLIAM F. KELLY, Jr., WILLIAM VINCENT MUSTO, FAIRLEIGH DICKINSON, Jr., GARRETT W. WAGEDORF, WILLARD B. KNOWLTON, ALFRED D. SCHIAFFO, JOSEPH C. WOODCOCK, Jr., IRA SCHOEN, FRANK J. SCIRO, EDWARD SISCO, and WAYNE DUMONT, Jr.,

Respondents,

and

NEW JERSEY BAR ASSOCIATION,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Herman Stein,
Counsel for Petitioners,
125 Ellison Street,
Paterson, New Jersey, 07505.

Joseph J. Salerno,
Newton M. Robner,
On the Petition.

Admiral Press Corp., 11 Commerce Street, Newark, N. J.—Market 4-2211-12

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Respondents,

and

NEW JERSEY BAR ASSOCIATION,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Passaic County Bar Association, a non-profit membership corporation of the State of New Jersey, Newton M. Roemer and William J. Marchese, your Petitioners, pray that a writ of certiorari issue to review the order of dismissal by the Supreme Court of New Jersey, entered in the above entitled case on October 7, 1970.

Opinions Below

The opinion of the Honorable Worrall F. Mountain, sitting as Judge of the Superior Court, Chancery Division, Passaic County is reported at 108 N. J. Super. 161, 260 A. 2d 261 and is set forth in Appendix A hereto, *infra*, page 1a (*Passaic County Bar Association et al.* v. *Hughes, et al.*).

The order of the Superior Court of New Jersey, Appellate Division, dismissing the appeal from the Chancery Division is set forth in Appendix B hereto, *infra*, page 18a.

The order of the Supreme Court of New Jersey dismissing the appeal from the order of the Appellate Division is set forth in Appendix C hereto, *infra*, page 20a.

Neither the Appellate Division nor the Supreme Court considered the merits and neither Court rendered a formal opinion.

Jurisdiction

1. The judgment of the Supreme Court of New Jersey was entered on October 7, 1970 (Appendix C, *infra*, page 20a). It is final by its terms.

2. The Federal Question was raised in the Complaint (Appendix D, *infra*, page 21a).

3. The jurisdiction of this Court is involved under 28 U. S. Code §1257 (3).

Questions Presented

The New Jersey State Senate adheres to a custom known as "Senatorial Courtesy". Under this custom, when the Governor nominates a candidate for judicial office, any one of the Senators elected from the home county of the nominee may prevent consideration of the nomination by making known to the Judiciary Committee of the Senate his objection to the nominee. The New Jersey Constitution in Article VI, Section 6 (1) empowers the Governor to nominate and appoint certain Judges with the advice and consent of the Senate.

The New Jersey State Senate frustrates the Governor's power to make interim appointments by claiming to be in session when in fact it is not. Colloquially this technique used by the New Jersey State Senate is referred to as the "Long Resolution". The device which it employs is to list a series of dates each three days apart which have the apparency of a series of adjournments, but which, in fact and in reality, effectively plans the Senate in a state of recess.

The questions presented are:

1. Does not the system of "Senatorial Courtesy" as it presently operates and as it is applied to judicial appointments violate the due process clause of the Fourteenth Amendment?

2. Is not the senatorial device of adopting a "Long Resolution", the purpose of which is to prevent the Governor from exercising the power of interim appoint-

ments, violative of the due process clause of the Fourteenth Amendment?

3. Does not the practice of "Senatorial Courtesy" and the use of the "Long Resolution" which creates a situation in which the civil courts of a county are effectively shut down constitute a denial of due process under the Fourteenth Amendment?

4. Where the civil courts have been effectively shut down for nine months, resulting in further exacerbation of a congested calendar condition, are the issues of denial of due process and equal protection rendered moot when the Governor and the Senate eventually get together on judicial appointments?

Constitutional Provisions Involved

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

Article III, Section 1, Paragraph 1 of the New Jersey Constitution provides:

> "The powers of the government shall be divided among three distinct branches, the legislative, executive and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

Article V, Section 1, Paragraph 13 of the New Jersey Constitution provides:

> "The Governor may fill any vacancy occurring in any office during a recess of the Legislature, appointment to which may be made by the Governor with the advice and consent of the Senate, or by the Legislature in joint meeting. An ad interim appointment so made shall expire at the end of the next regular session of the Senate, unless a successor shall be sooner appointed and qualify: and after the end of the session no ad interim appointment to the same office shall be made unless the Governor shall have submitted to the Senate a nomination to the office during the session and the Senate shall have office during the session and the Senate shall have adjourned without confirmation or rejecting it. No person nominated for any office shall be eligible for an ad interim appointment to such office if the nomination shall have failed of confirmation by the Senate."

Article VI, Section 6, Paragraph 1 of the New Jersey Constitution provides:

> "The Governor shall nominate and appoint with the advice and consent of the Senate, the chief Justice and Associate Justices of the Supreme Court, the Judges of the Superior Court, the Judges of the County Courts and the Judges of the inferior courts with jurisdiction extending to more than one municipality. No nomination to such an office shall be sent to the Senate for confirmation until after seven days' public notice by the Governor."

Statement of Facts

The Passaic County Bar Association is a non-profit membership corporation. All of its members, of whom there are approximately 750, are members in good standing of the New Jersey Bar; maintaining an office in, residing in, or having some special interest in the administrating of justice in the County of Passaic. The Constitution of the said Association states that among its purposes are the proper administration of law and the advancement of the public welfare.

In Passaic County, as in other counties in New Jersey, Judges of the County Court, County District Court and Juvenile and Domestic Relations Court are all available for assignment by the Assignment Judges to the hearing and disposition of general civil litigation.

Beginning in April of 1967, a series of judicial vacancies developed for which the Governor submitted nominations but with respect to which the Senate did not take action. In other cases the Governor did not submit nominations for the Senate to consider. In any event, for approximately two years judicial manpower was effectively diminished especially with respect to the County of Passaic, where the Court calendar situation deteriorated from crisis to crisis. At the trial level of the instant action the fact of an emergency in the trial of civil causes in Passaic County was admitted. The administration of justice in the County of Passaic, State of New Jersey, had so deteriorated that on June 27, 1969, the Honorable John F. Crane, Assignment Judge of the County, acting pursuant to the authority vested in him by the Chief Justice of the Supreme Court, announced the suspension of the civil trial calendar in the County effective with the commencement of the September 1969

term of court. The plaintiffs here responded to the acute public and professional pressure and instituted this action to bring about an adequate staffing of the Courts and to require the Governor to submit nominations as mandated by the State Constitution and called upon the Senate to take action upon those nominations, all in accordance with the Constitutional provisions. Plaintiffs were uniformly unsuccessful in their efforts because, while the facts were not in dispute, the trial judge declined to grant the relief requested because he considered that the issue was non-justiciable. The Appellate Division dismissed the appeal on the grounds that the issue was moot. It never considered the case on its merits and rendered no opinion. The Supreme Court of the State of New Jersey also did not consider the case on the merits and dismissed plaintiffs' appeal without opinion.

Reasons for Granting the Writ

The action of the courts below has effectively denied plaintiffs their rights of due process and equal protection and has deprived plaintiffs of warranted judicial intervention to prevent the Legislature and the Governor jointly or severally from shutting down the operation of the Judiciary.

At the very earliest stage of development of the law in terms of the 1948 Constitution of New Jersey, Chief Justice Vanderbilt stated with great certainty his conviction that it was never intended that the Legislative branch exercise any control over the functioning of the Judicial branch:

> "If the Legislature may amend the rules of court, it may decide the extent to which the Law Division and the Chancery Division shall exercise the pow-

> ers and functions of the other division, and it may control the degree to which legal and equitable relief may be granted in any cause. We think it may be safely said that no such thoughts were ever in the mind of any member of the Constitutional Convention or of any citizen who voted for the Constitution. And yet if 'subject to law' means subject to legislation, such results might inevitably follow. The courts in some of their essential judicial operations, instead of being one of the three coordinate branches of the State Government, would have been rendered subservient to the Legislature in a fashion never contemplated by any." *Winberry* v. *Salisbury*, 5 N. J. 240, 247, 74 A. 2d 406, 410 (1950).

We submit that the attempt of the Legislature to control the operation of the Judiciary through the refusal to provide judicial personnel is a more devastating blow to the Judiciary than the power to enact adjective law could have been.

Over the years Legislative bodies have attempted to avoid legitimate inquiry into their functioning in a constitutional *sense by raising the cry of* "separation of powers" and "political question." In actuality the problem has never been one of legitimate separation of powers or of jurisdiction. The proper role of the judiciary as the supreme arbiter of constitutional issues was long ago decided in *Marbury* v. *Madison*, 1 Cranch, 137.

The "political question" had been used in the past to describe areas into which the federal courts preferred not to go despite the existence of legitimate and justiciable constitutional disputes. The decision in *Baker* v. *Carr*, 369 U. S. 186 (1962) and cases following it: *Lucas*

v. *Forty-Fourth Gen. Assembly*, 377 U. S. 713 (1964); *Roman* v. *Sincock*, 377 U. S. 695 (1964); *Davis* v. *Mann*, 377 U. S. 678 (1964); *Maryland Comm. for Fair Representation* v. *Tawes*, 377 U. S. 656 (1964); *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964); *Reynolds* v. *Sims*, 377 U. S. 533 (1964) have forever interred this judicial hesitancy (too often improperly characterized as restraint).

Bond v. *Floyd*, 385 U. S. 116 (1966) made it even clearer that the judicial branch would hear and determine all proper constitutional issues and would not be put off by artificial strictures spun from non-existent legislative immunity based upon an historic but erroneous distinction between the activities of legislative bodies which result in formal legislation (*Marbury* v. *Madison*, *supra*, settled that aspect) and other activities of legislative bodies having important public effect but which do not result in specific legislation. Finally the ancient doctrine breathed its last in *Powell* v. *McCormack*, 23 L. Ed. 491 where the opinion, particularly commencing at page 511, and thereafter makes it quite clear that any prior hesitancy on the part of the courts to decide questions of this genre was not based upon any constitutional impediment.

In *Asbury Park Press, Inc.* v. *Woolley*, 33 N. J. 1 (1960), (in reapportionment case) the argument was made that the court was without jurisdiction to hear the matter. Indeed, the trial court had dismissed on that ground. The Court held that:

> "The jurisdictional objection is without merit. It has long been settled in this State that adjudication of problems such as the present one is not only within the ambit of the constitutional authority of the courts, but represents one of their duties

as well. *Wilentz* v. *Stanger*, 120 N. J. L. 606 (E. & A. 1938); *Botti* v. *McGovern*, 97 N. J. L. 353 (Sup. Ct. 1922); *Smith* v. *Baker*, 73 N. J. L. 238 (Sup. Ct. 1906), affirmed *per curiam* 74 N. J. L. 391 (E. & A. 1906); *State* v. *Wrightson*, 56 N. J. L. 126 (Sup. Ct. 1893)." (p. 10)

The statement of the obligations of the Judicial branch which is set forth in the opinion of Justice Francis is particularly appropriate in the case before this Court. It should be noted that the *inaction* of the Legislature was being attacked in the *Asbury Park* case rather than the action of the Legislature in any particular legislative matter:

"The judicial branch of the government has imposed upon it the obligation of interpreting the *Constitution* and of safeguarding the basic rights granted thereby to the people. In this sphere of activity the courts recognize that they have no power to overturn a law adopted by the Legislature within its constitutional limitations, even though the law may be unwise, impolitic or unjust. The remedy in such case lies with the people. But when legislative action exceeds the boundaries of the authority delegated by the *Constitution*, and transgresses a sacred right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts. It cannot be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it. *State* v. *Wrightson*,

supra, 56 N. J. L. at page 389. The authority and the duty to act when our jurisdiction is invoked in cases like the present, in the words of Chief Justice Beasley in *State* v. *Rogers*, 36 N. J. L. 480, 615 (Sup. Ct. 1874), is 'so entirely established as not to be debatable.' And as the present Chief Justice said in *Village of Ridgefield Park* v. *Bergen Co. Bd. of Taxation*, 31 N. J. 420, 425 (1960), when it is regularly invoked we cannot 'properly look the other way.'

'Recognition of this judicial burden is not peculiar to New Jersey. The responsibility has been accepted in numerous other jurisdictions. (Citation of numerous authorities)

* * *

"From the foregoing it is manifest that the trinity of our government is not invaded by acceptance of this litigation for decision. * * * The law-making body cannot by inaction alter the constitutional system under which it has its own existence." (pp. 13, 14)

In *Jackman* v. *Bodine*, 43 N. J. 453, 473 (1964), the New Jersey Supreme Court, while retaining jurisdiction, nevertheless called upon the Legislative branch to adopt a plan to correct the mischief. The Supreme Court also made it clear that absent appropriate action by the Legislature the Judiciary would take action.

In any discussion of issues of the type presented here the argument is inevitably made that the Judicial branch will not act or should not act because of its inability to enforce its judgments (the question has frequently been discussed with respect to *Powell* v. *McCormack*, *supra*).

In *Asbury Park Press*, the New Jersey Supreme Court met the question quite directly:

> "A judiciary, conscious of the paramount quality of its oath of office to uphold the Constitution, cannot accept an *in terrorem* argument based upon the notion that members of a coequal part of the government will not be just as respectful and regardful of the obligations imposed by their similar oath. Any less faith on our part would be an unbecoming and unwarranted reflection on the Legislature." (33 N. J. at p. 15).

The relief now sought in this case is by way of declaratory judgment.

The Senate and the Executive were deadlocked with respect to judicial appointments for a period of years. The judiciary in Passaic County was severely depleted to the extent that a judicial crisis of such magnitude resulted as to require the suspension of civil trials. For all practical purposes, the upper courts in Passaic County were shut down for nine months, notwithstanding that there was a crisis calendar situation and that the constitutionally guaranteed right of free access to the courts was abrogated. The underlying calendar congestion had itself been largely caused by the fact that there had been a long-standing shortage of judicial manpower to serve in the courts of Passaic County. Although the judicial vacancies have since been filled, many of the harmful residuals of the calendar congestion still persist.

The Senate acknowledged that the lack of judicial manpower was the direct result of a "deadlock" and that its failure to act upon nominations, when submitted, was a product of the system of "Senatorial Courtesy."

Judge Mountain in his Opinion below, clearly spelled out how "Senatorial Courtesy" works, when he wrote:

> "This practice, insofar as it relates to judicial appointments, may be stated as follows: If a nomination to judicial office with respect to a particular county is displeasing to one or more of the Senators from that county, then the other members of the Senate will take no action looking to the confirmation of the proposed nominee and this quite apart from the nominee's qualifications or lack thereof." (See Appendix A at page 9a)

The fact of the emergency in the trial of cases in Passaic County was acknowledged by the Senate from time to time and it is not disputed here. Even though the judicial vacancies have been filled, the argument that the appeal is thereby rendered moot is without merit.

The lack of power which the Chancery Division found should not inhibit this court from acting. Plaintiffs no longer seek mandatory relief because, admittedly, the judicial vacancies have been filled and the courts are once more open, albeit congested. The two conditions for justiciability relevant on appeal—adverse interest and effective remedy, are present here. There is a full record and defendants have admitted the plaintiffs' factual presentation. *Hilton* v. *New York*, 392 U. S. 40, 57 (1968).

The historical posture of the courts to avoid deciding moot cases has rested on their inability to render an effective judgment, but this philosophy has no application here where the mandatory relief stated in the first count has been withdrawn. Ours is not a case where mootness is invoked because of the inability to grant prospective

relief, such as injunction and mandamus. Nor should considerations of judicial economy prevent the court from acting here. To the contrary, it may be fairly stated that a finding by the court that this case is *not* moot will really foster the best interests of judicial administration and will advance the judicial economy. *Meyers* v. *Jay Street Connecting R. R.*, 288 F. 2d 356, 358-59 (2d Cir.), cert. den. 368 U. S. 828 (1961).

We believe the court should review this important public question, failing which, future litigation will surely result. Especially is this so where our demand is for declaratory relief in a matter so clearly of public importance. *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).

The overriding public interest cries out for judicial resolution.

Nothing less than the destruction of the judicial system is at stake. The fact that the mischief may have been limited to one county is beside the point. The defendant Senate took the position in the trial court that "The Executive and the Senate are co-equals in this function (nomination and confirmation of judicial officers) and they must be left to resolve their differences." The Senate accepted the factual proposition that the failure of the Executive and Senate to ". . . resolve their differences . . ." had created an "emergency," and that the Executive and the Senate ". . . had from time to time acknowledged the existence of a judicial crisis in Passaic County and had exhibited an awareness of an emergency affecting the administration of civil justice in Passaic County." The matter at issue thus resolves itself into

the question of whether the failure of the Executive and Senate "to resolve their differences" with its by-product of an absence of judicial officers is a condition which the affected branch, the Judiciary, must accept, even though it be destroyed thereby.

Article III of the New Jersey *Constitution* consists of a single paragraph. That paragraph states a concept which may be found only by interpretation in the United States *Constitution*. We restate its provisions in full:

> "Branches of government
>
> "1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

No reasonable reading of Article III can lead to the conclusion that the Legislative and/or Executive branch has the power to impede or destroy the operation of the Judicial branch, nor can Article III be interpreted as prohibiting the Judiciary from taking proper action to insure constitutional compliance by the other branches. Justice Black has addressed himself to these matters in language apposite here. (*A Constitutional Faith*, Alfred A. Knopf, 1969):

> "I believe that the responsibility of judicial review was fully understood by those who wrote the Constitution, and certainly by those who most carefully considered the problem. This fact is shown, I think, by the *Federalist Papers*, the records of the

debates in the Constitutional Convention and in the states, and the *Annals of Congress'* report of the debates on the Bill of Rights. Madison, himself, in arguing for adoption of the Bill of Rights, stated:

> 'If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.'

"I think that the Framers were right in believing that such judicial power is an essential feature of our type of free government, and I believe it ill behooves the courts to restrict their usefulness in protecting constitutional rights by creating artificial judicial obstacles to the full performance of their duty."

Perhaps more directly to the point, Alexander Hamilton defined the role of judges in protecting the Judiciary from incursions upon its power and functions by the other branches (The Federalist, No. 78):

> ". . . the judiciary is beyond comparison the weakest of the three departments of power"; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endan-

gered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'† And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security."

"* The celebrated Montesquieu, speaking of them, says: 'Of the three powers above mentioned, the judiciary is next to nothing.'—'Spirit of Laws,' vol. i., page 186.—Publius

"† Idem. page 181.—Publius"

CONCLUSION

The "deadlock", "senatorial courtesy", the "long resolution" and the ultimate failure of both the Executive and Legislative branches to perform their duty combined to deprive the plaintiffs of the equal protection of the law, of their rights as guaranteed by the *Constitution* of New Jersey, Arts. I and VI, and the *Constitution* of the United States, Art XIV. The custom of senatorial courtesy is not conferred on the Senate by Article VI, Section VI, Para. 1 of the New Jersey *Constitution*. The powers to preserve the judicial function is constitutionally within the power of the Judicial branch and should be applied here.

Respectfully submitted,

HOWARD STERN,
Counsel for Petitioners,
125 Ellison Street,
Paterson, N. J. 07505

JOSEPH J. SALERNO,
NEWTON M. ROEMER,
On the Petition.

APPENDIX A

Opinion of the Superior Court of New Jersey, Chancery Division—Passaic County

[108 N. J. Super. 161]

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—PASSAIC COUNTY

Docket No. C 3296-68

PASSAIC COUNTY BAR ASSOCIATION, a non-profit membership corporation of the State of New Jersey, NEWTON M. ROEMER and WILLIAM J. MARCHESE,

Plaintiffs,

v.

RICHARD J. HUGHES, The Governor of the State of New Jersey, and FRANK X. McDERMOTT, The President of the Senate of the State of New Jersey, and THE MEMBERS OF THE SENATE OF THE STATE OF NEW JERSEY, *et als.*,

Defendants.

Argued: October 24, 1969.

Decided: December 22, 1969.

Mr. Howard Stern argued the cause for the plaintiffs (Messrs. Howard Stern, Bernard L. Albert, Joseph D. J. Gourley, Joseph Salerno, on the brief).

Appendix A

Mr. Arthur J. Sills, Attorney General, by William S. Greenberg, Deputy Attorney General, argued the cause for the defendant Richard J. Hughes (Messrs. Alan J. Karcher and William Greenberg, on the brief).

Mr. William E. McGlynn argued the cause for the defendant members of the Senate (Messrs. McGlynn and McGlynn, attorneys).

Mr. John Given appeared for the New Jersey State Bar Association, *Amicus Curiae* (Messrs. Parsons, Canzona, Blair and Warren, attorneys).

MOUNTAIN, J.S.C.

This suit has been brought by the Passaic County Bar Association, Newton M. Roemer, Esq., President of the Association and William J. Marchese, Esq., its immediate past President. The defendants are the Honorable Richard J. Hughes, Governor of the State of New Jersey, the Honorable Frank X. McDermott, President of the Senate of the State of New Jersey and all other individual members of the Senate. The New Jersey State Bar Association appears as *amicus curiae*.

The Passaic County Bar Association is a nonprofit membership corporation, incorporated pursuant to Title 15 of the New Jersey Revised Statutes. It is composed of approximately 650 members, all of whom are attorneys of this state in good standing, practicing or residing in the County of Passaic. In summary, the complaint charges that there are a disproportionately large number of judicial vacancies in Passaic County, that these have existed for an unwarranted period of time, that as a result of

the long continued failure to fill these vacancies the trial of civil law actions in the county has virtually ceased, that this condition is the result of improper inaction on the part of the Governor and the Senate, that the plaintiffs have standing to bring this suit to correct this condition and that the courts have the necessary competence to grant the relief sought.

The respective roles of the Governor and Senate in the nomination and appointment of members of the judiciary is set forth in the State Constitution:

> "The Governor shall nominate and appoint, with the advice and consent of the Senate, the Chief Justice and Associate Justices of the Supreme Court, the Judges of the Superior Court, the Judges of the County Courts and the judges of the inferior courts with jurisdiction extending to more than one municipality. No nomination to such an office shall be sent to the Senate for confirmation until after seven days' public notice by the Governor." N. J. Const., Art. VI, § 6, par. 1.

The facts are not in dispute. A vacancy occurred in the office of Judge of the Juvenile and Domestic Relations Court on April 28, 1967. On April 2, 1969 the Governor indicated his intention to nominate a successor to this office and thereafter delivered the nomination to the Senate on April 10, 1969. On June 28, 1967 an additional County Court judgeship for Passaic County was created by act of the Legislature. On April 2, 1969 the Governor indicated his intention to fill this position and on April 10 delivered the nomination to the Senate. On September 7, 1967 a Judge of the Passaic County District Court

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died. On the second of April, 1969 an intention to nominate a successor was submitted by the Governor, as was the nomination itself on April 10. No action has been taken by the Senate with respect to any of these three nominations.

On April 21, 1969 the Governor gave notice of his intention to nominate a resident of Passaic County to fill a prospective vacancy on the Superior Court. On April 28 the nomination was made. Senate confirmation followed on May 15. The nominee took office in September, 1969 and is presently sitting in Passaic County.

On August 1, 1969 a Judge of the Passaic County Court was mandatorily retired by reason of age. A like retirement with respect to a Judge of the Superior Court now sitting in Passaic County will occur January 1, 1970. On July 30, 1969 the Governor gave public notice of his intention to nominate a Judge of the Passaic County District Court to succeed the retiring County Court Judge and of his further intention to fill the vacancy that would thus ensue on the District Court with a designated nominee. At the same time he expressed his intention to nominate a particular candidate to fill the anticipated Superior Court vacancy when that should occur. Nominations with respect to two of these proposals were submitted on August 6. No action has been taken by the Senate as to these nominations.

The court will judicially notice the fact that in November, 1969 a further vacancy in the Passaic County Court bench occurred by reason of resignation and that this vacancy still exists.

Near the end of June, 1969, the Assignment Judge of Passaic County, the Honorable John F. Crane, announced

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the suspension of the trial of civil cases in the Law Divisions of the Superior and County Courts due to the shortage of judges. The suspension became effective with the commencement of the September, 1969 term of court and continues to date.

Plaintiffs contend that the suspension of the trial of civil law suits amounts to a breakdown in the mechanism of state government, that as citizens, taxpayers and lawyers living and practicing in the county they have standing to seek to right this condition and that the courts should afford the means.

As is indicated above there are presently no judicial vacancies with respect to which appropriate executive action has not been taken with the exception of a County Court vacancy which came into being only in November, 1969 and which, for this reason, is not mentioned in the complaint. It is true, however, that the Legislature has neither confirmed nor rejected any of the nominees for the vacant positions that have been submitted by the Governor. Plaintiffs attribute this inaction to the practice of Senatorial courtesy of which more will be said below.

The plaintiffs ask the court, by way of relief, to compel the executive and legislative branches of the government to act (mandamus), to order the Senate to cease and desist from the practice of Senatorial courtesy (injunction) and to define the "advice and consent" clause quoted above, determine and declare the status of pending nominations and declare the practice of Senatorial courtesy to be illegal and unconstitutional (declaratory judgment).

Initially consideration must be given to the question of justiciability. Are the issues presented and the relief

sought matters which are subject to judicial resolution or do the issues, or any of them, present "political questions" to be deemed nonjusticiable in the light of the doctrine of the separation of powers? This doctrine is set forth in our State Constitution in the following language:

> "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution." N. J. Const., Art. III, par. 1.

There has never really developed either a judicial or academic consensus as to the theoretical bases upon which the political question doctrine rests nor as to its scope nor as to the kind of case that will surely provoke its application. For example, compare, Finkelstein, *Judicial Self-Incrimination*, 37 Harv. L. Rev. 338 (1924); Weston, *Political Questions*, 38 Harv. L. Rev. 296 (1925); Finkelstein, *Further Notes on Judicial Self-Incrimination*, 39 Harv. L. Rev. 221 (1925); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L. J. 517 (1966); *Baker* v. *Carr*, 369 U. S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962); *Powell* v. *McCormack*, 395 U. S. 486, 23 L. Ed. 2d 491, 89 S. Ct. —— (1969). It has been aptly described by Justice Brennan as "a function of the doctrine of the separation of powers." *Baker* v. *Carr*, *supra* at 7 L. Ed. 2d at 682.

Underlying all discussion of the subject is a general recognition that our tripartite division of the powers of government, whether viewed at the national or state level,

was intended to allocate to the political branches of government a competence, in certain areas at least, ill defined as they may be, to reach ultimate decisions and to engage in practices that are not subject to judicial supervision or review. I am aware that proponents of the "classical theory" of judicial review may disagree with this statement as seeming to justify a privilege of self-abnegation on the part of the judiciary, the exercise of which may result in a failure to accept the obligation "to say what the law is" whenever the decision of a case requires it. This theory, which appears to impose upon the judiciary a duty of decision from which there is no escape, was adopted, it is said, by Chief Justice Marshall in *Marbury* v. *Madison*, 5 U. S. (Cranch) 137, 177-178, 2 L. Ed. 60 (1803) and is implicit, if not indeed explicit in the doctrine of judicial review which that decision expounded. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, *supra*, at 518. A protagonist of the classical theory, in referring to the political question doctrine, has said that "all the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 7-8 (1959). This appears to be the approach adopted by the Supreme Court in *Powell* v. *McCormack*, *supra*, where Chief Justice Warren observed that the Court must interpret the Constitution and determine what power that document confers on the Senate before the Court can determine to what extent the exercise of that power is subject to judicial review. 23 L. Ed. 2d at 514. From the point of view of

ultimate result is seems no great matter whether, in cases of this sort, courts be said to exercise judicial self-restraint or, through the interpretive process, arrive at the conclusion that the matter rests wholly with a co-ordinate branch of government.

The majority opinion in *Baker* v. *Carr, supra,* with respect to the political question doctrine merits notice at this point. There it is said that any case held to involve a political question—and which will therefore and for that reason be nonjusticiable—will clearly present at least one of the following formulations: "a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 7 L. Ed. 2d at 686.

The court is here considering the political question doctrine in relation to the national government and the Federal Constitution. Admittedly certain of the "formulations" are almost certainly directed to questions of foreign affairs, treaties and the like with which a state government has no constitutional concern but which have very often provided the occasion for an invocation of this doctrine in the federal courts. Certain of the formulations, however, and especially the first two, seem immediately

relevant to the problem we are considering at the state level.

It is necessary at this point to consider briefly the nature and history of the practice of Senatorial courtesy which is really the principal target of the plaintiffs' challenge. This practice, insofar as it relates to judicial appointments, may be stated as follows: If a nomination to judicial office with respect to a particular county is displeasing to one or more of the Senators from that county, then the other members of the Senate will take no action looking to the confirmation of the proposed nominee and this quite apart from the nominee's qualifications or lack thereof.

Historically the practice, in its present form at least, did not exist in New Jersey prior to the adoption of the Constitution of 1844 for the reason that prior to that time the Governor had no power of judicial appointment. The Constitution of 1776 placed this power in the legislative council and general assembly, acting jointly. N. J. Const. (1776), Art. XII. Indeed the governor himself was appointed in the same fashion, Art. VII, rather than by the electorate at large.

The Constitution of 1844 provided that all the principal judicial officers of the state should "be nominated by the governor and appointed by him, with the advice and consent of the senate." N. J. Const. (1844), Art. VII, § 2, par. 1. It will be seen that this language is substantially like that contained in the present Constitution of 1947 and quoted above. This mode of appointment and the language in which it was cast were directly adopted from the Federal Constitution which provides that the President "shall nominate, and by and with the Advice and

Consent of the Senate, shall appoint. . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . ." U. S. Art. II, § 2. A little more than half a century of federal experience lay unveiled before the members of the Constitutional Convention that met in Trenton in the spring of 1844 and unquestionably it was known and considered.

What had this experience been? In *The Federalist* (No. 66) Alexander Hamilton, in commenting upon the appointing power, had prophesied,

> "It will be the office of the President to *Nominate*, and with the advice and consent of the Senate to *Appoint*. There will, of course, be no exertion of *Choice* on the part of the Senate. They may defeat one choice of the Executive and oblige him to make another; but they cannot themselves *Choose*—they can only ratify or reject the choice of the President. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed, because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their consent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen that the majority of the Senate would feel any other complacency toward the object of an appointment than such as the appearance of merit might inspire, and the proofs of the want of it destroy."

History has shown this prophecy to have been almost totally in error.[1]

The first instance of Senatorial courtesy occurred early in Washington's first administration. The president nominated one Benjamin Fishbourn to the post of naval officer of the port of Savannah. Despite his "excellent qualifications the Senate rejected the nomination as a courtesy to the two senators from Georgia, who had a candidate of their own. The following day Washington withdrew the nomination of Fishbourn and yielded to the two Georgia senators by nominating the candidate they desired; . . ." Harris, *The Advice and Consent of the Senate* 40 (1953). This practice has continued, despite recurrent executive expostulation, until the present time.[2]. In general only two occasions have been deemed appropriate for the waiving of the practice of Senatorial courtesy: where the nominee is nationally recognized as exceptionally outstanding or where the Senator seeking to invoke the privilege is not in the good graces of his colleagues in the Senate. *cf. Harris, supra,* at 219.

Following the adoption of the Constitution of 1844 in New Jersey the practice quickly became common and has

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[1] More than a century after Hamilton's prophecy, ex-President Taft stated that "[t]he appointing power is in effect in their (the Senators') hands, subject only to a veto by the President." 2 Haynes, *The Senate of the United States* 736 (1938).

[2] "The Senate . . . when loath openly to reject a nomination, has often taken no action upon it, or after long delay, has voted to postpone its consideration indefinitely. At least ten nominations to the Supreme Court have been blocked in this way." 2 Haynes, *The Senate of the United States* 770 (1938).

been more or less followed ever since. Just as has been true at the federal level, it has been constantly decried by the executive. In 1941 Governor Edison said of Senatorial confirmation in general and of Senatorial courtesy in particular, "[a] governor of New Jersey is called upon to rely in his administration of the state offices upon numerous executives over whom he does not have this basic control (the appointing and removal power). He is certain to find that some of these men on whom he must depend worked personally, perhaps even used their departments, to prevent his election." Governor Edge is said to have held the same view but stressed that the practice was more pernicous with respect to county than to statewide nominees.[3]

In an address delivered before the Essex County Bar Association in April, 1965, (and which has been filed as an appendix to plaintiffs' brief) Governor Hughes took sharp issue with this practice. At that time there were unfilled vacancies in Essex County for which the Governor had proposed nominees. He described the increasing backlog of cases as a hardship to the citizens of the entire state that was directly attributable to "a tradition known as senatorial courtesy, which is certainly being grossly abused in New Jersey today." The Governor added, "[i]t is bad enough that a Senator may say for no valid reason who shall not be a judge. It is inexcusable that a Senator should attempt to dictate who the judge shall be." He described the rule as it actually operates. "Here is how it works—a vacancy occurs or a new judgeship is cre-

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[3] Mazur, *Senatorial Confirmation Procedure in America State Governments* 4 (1950). (Unpublished thesis, Library of University of California.)

ated. The Governor, after exhaustive consultation and careful consideration, sends to the Senate the name of the individual he deems most qualified by temperament and professional ability to occupy that judgeship. The nomination is referred to the Judiciary Committee for study and evaluation. The nominee's home county Senator, who may or may not be a member of the committee, then announces that he will not move the appointment and thereby, under the tradition of senatorial courtesy, forecloses indefinitely any consideration by the committee on the merits of the nomination."

With this brief word as background, we return to the principal issue posed: may this practice, privilege, tradition—call it what you will—of Senatorial courtesy be judicially examined and its constitutionality determined by this court or is it immune from such scrutiny and judicial evaluation under the political question doctrine discussed above. In my opinion, as presented to this court in this case the issue is non-justiciable.

In *Kligerman* v. *Lynch*, 92 N. J. Super. 373 (Ch. Div. 1966), *cert. denied*, 389 U. S. 822, 19 L. Ed. 2d 74, 88 S. Ct. 49 (1967) Judge Wick had occasion to consider this precise issue. He there observed, at page 375,

> "Plaintiffs contend that rejection of qualified nominees for personal reasons is so arbitrary as to be incompatible with the power vested in the Senate, and that the framers of the Constitution never intended this check on the appointive power to supplant a properly exercised executive function.
>
> "While this court must agree with plaintiffs that the constitutional draftsmen never intended the advice and consent clause to be so used, it cannot

agree that it has the power to rectify the situation."

The decision of the Court that the practice of Senatorial courtesy presented a non-justiciable issue was rested in large part upon a finding that it was not the intention of the framers of the Constitutions of 1844 and 1947 to invest the courts with power to supervise the Legislature's internal procedures where these are not spelled out in the Constitution. With this I agree. Furthermore, there may be added, as additional grounds for reaching the same result, the first two of the "formulations" set forth by Justice Brennan in *Baker* v. *Carr*, *supra*, and quoted above. There is here "a textually demonstrable constitutional commitment of the issue" to the coordinate political branches of government. The Governor (executive) is authorized to nominate and appoint. The Senate (legislative) is to advise and, before the appointment may be finally made, to consent. Here is a clear commitment derived from the text of the Constitution itself. N. J. Const. (1947), Art. VI, §6, par. 1. In *Powell* v. *McCormack*, *supra*, it was held that an internal matter (determination of membership) in a legislative body (House of Representatives) was reviewable by the Court; but there the specific qualifications for membership were themselves set forth in the Constitution. In asserting and exercising its right to review the Court did no more than establish the exclusive nature of the particular qualifications for membership in the House that the Constitution enumerated. There are no similarly express constitutional directions as to the precise manner in which the executive and legislative branches are to undertake their responsibility of making appointments. No standards to guide judicial action are supplied; in *Powell* they are explicit.

Thus there is also "a lack of judicially discoverable and manageable standards" for resolving the issue. How is a judicial inquiry to be undertaken to find out whether in fact inaction on the part of the Senate results from a deference to the tradition and practice of Senatorial courtesy or from some other cause? Are Senators to be interrogated as to the reasons and motivations for their actions or their inaction?

For these various reasons the court concludes that whether or not the practice of Senatorial courtesy is or is not constitutional, at least as the point arises here, it is a nonjusticiable issue which the court should not undertake to resolve. Whether the practice is to be longer sanctioned or finally condemned must be determined at the bar of public opinion.

Specific relief is also sought against the Governor. It must be denied for several reasons. In the first place, in the exercise of the appointing power the executive branch of the government is immune from judicial supervision to the same extent and for the same reasons as is the legislative branch. The reasons are set forth above and apply equally to each of the political branches of government in the exercise—or seeming non-exercise—of this constitutionally delegated authority. Secondly, the relief sought would require the court to issue a writ of mandamus or an order or judgment closely akin thereto. Such a judicial directive will not issue against the chief executive. In the third place the issue is moot, or perhaps more accurately no case or controversy is projected. As to the question of mandamus, we do not deed to look beyond a leading decision of our own courts, *The State* v. *The Governor*, 25 N. J. L. 331 (Sup. Ct. 1856). In

that case William Gledhill claimed to have been elected Surrogate of Passaic County and sought a writ of mandamus to compel Governor Price to issue his commission. The court denied the relief sought

> ". . . upon the broad ground that this court has no power to award a *mandamus*, either to compel the execution of any duty enjoined on the executive by the constitution, or to direct the manner of its performance. The exercise of such power would be an unwarrantable interference with the action of the executive within his appropriate sphere of duty. The constitution has divided the powers of government into distinct departments, and cautiously provided for their independent exercise. It has expressly forbidden any person belonging to, or constituting one of these departments, from exercising any of the powers properly belonging to either of the others, except as expressly provided in the constitution itself." at 349-350.

Plaintiff's argument that the granting of the commission was merely a ministerial act and might therefore be ordered by the court was likewise rejected upon the ground that whether ministerial or discretionary, it was nonetheless an *executive* act and as such beyond the reach of judicial supervision. We have before us a much stronger case for the denial of relief, an exercise of the appointing power being highly discretionary. More recent pronouncements to the same effect include *Cole* v. *Corio*, 105 N. J. L. 511, 513 (Sup. Ct. 1929); *Prudential Ins. Co. of America* v. *Clifton, etc. Co.*, 109 N. J. Eq. 349, 350 (Ch. 1931); *Driscoll* v. *Sakin*, 121 N. J. L. 225 (Sup. Ct. 1938); *Allan* v. *Durand*, 137 N. J. L. 30 (Sup. Ct. 1948).

Finally, there is really no controversy as to this issue before the court. At the time the suit was started Governor Hughes had taken appropriate action with respect to all existing vacancies.

Plaintiffs project one further argument which should be considered. Art. V, §1, Par. 13 of our State Constitution authorizes, but does not require, the Governor to make an *ad interim* appointment to "fill any vacancy occurring in any office during a recess of the Legislature." I withhold any determination as to whether there is or has been a "recess of the Legislature." Suffice it to say that for reasons given above the court would in no event have the competence to direct the executive to exercise the power of *ad interim* appointment conferred by this paragraph of the Constitution, assuming such recess to exist.

The argument seems to go further and to suggest that the nominations presently before the Senate are no longer viable. I cannot read this constitutional provision to support such a result.

The court has purposely refrained from passing upon the question as to whether the plaintiffs do or do not have standing in respect of any of the particular issues raised, having preferred to treat the case in the manner set forth above.

Counsel may submit a form of judgment reflecting the conclusions reached.

APPENDIX B

Order of the Superior Court of New Jersey, Appellate Division Dismissing Appeal

(Filed—June 29, 1970)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-811-69

Motion No. M-809-69

Before Part A

PASSAIC COUNTY BAR ASSOCIATION, *et als*,

vs.

RICHARD J. HUGHES, The Governor of the State of New Jersey, and FRANK X. McDERMOTT, *et al*.

Moving Papers Filed June 1, 1970

Answering Papers Filed June 23, 1970

Date Submitted to Court June 12, 1970

Date Argued

Date Decided June 29, 1970

ORDER

This matter having been duly presented to the Court, it is hereby ORDERED as follows:

Appendix B

Cross Motion to Dismiss Appeal—Granted

SUPPLEMENTAL:

FOR THE COURT:

SIDNEY GOLDMANN,
P.J.A.D.

Witness the Honorable Sidney Goldmann, Presiding Judge of Part A, Superior Court of New Jersey, Appellate Division, this 29th day of June 1970.

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

APPENDIX C

Order of the Supreme Court of New Jersey Dismissing Appeal

SUPREME COURT OF NEW JERSEY

M-50 SEPTEMBER TERM 1970

PASSAIC COUNTY BAR ASSN., *et al.*,

Plaintiff-Appellant,

vs.

RICHARD J. HUGHES, *et al.*,

Defendant-Respondent.

This matter having been duly presented to the Court, it is Ordered that the motion to dismiss appeal is granted.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 7th day of October, 1970.

JOHN H. GILDEA
Clerk

APPENDIX D

Complaint of the Superior Court of New Jersey, Chancery Division, Passaic County

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—PASSAIC COUNTY

DOCKET NO. C 3296-68

PASSAIC COUNTY BAR ASSOCIATION, a non-profit membership corporation of the State of New Jersey, NEWTON M. ROEMER and WILLIAM J. MARCHESE,

Plaintiffs

vs.

RICHARD HUGHES, The Governor of the State of New Jersey, and FRANK X. MCDERMOTT, The President of the Senate of the State of New Jersey, and THE MEMBERS OF THE SENATE OF THE STATE OF NEW JERSEY: R. E. KAY, F. S. FARLEY, JOHN L. WHITE, HUGH A. KELLY, JOHN L. MILLER, FRANK C. ITALIANO, WILLIAM T. HIERING, EDWIN B. FORSYTHE, ALFRED N. BEADLESTON, RICHARD R. STOUT, RICHARD J. COFFEE, SIDO L. RIDOLFI, J. EDWARD CRABIEL, JOHN A. LYNCH, NORMAN TANZMAN, RAYMOND H. BATEMAN, NICHOLAS S. LA CORTE, MATTHEW J. RINALDO, JOSEPH J. MARAZITI, HARRY L. SEARS, GERARDO L. DEL TUFO, DAVID W. DOWD, MICHAEL A. GIULIANO, ALEXANDER J. MATTURRI, MILTON A. WALDOR, JAMES H. WALLWORK, FRANK J. GUARINI, JR., FREDERICK H. HAUSER, WILLIAM F. KELLY, JR., WILLIAM VINCENT MUSTO, FAIRLEIGH DICKINSON, JR., GARRETT W. HAGEDORN, WILLARD B. KNOWLTON, ALFRED D. SCHIAFFO, JOSEPH C. WOODCOCK, JR., IRA SCHOEM, FRANK J. SCIRO, EDWARD SISCO, and WAYNE DUMONT, JR.,

Defendants.

Appendix D

The plaintiff, Passaic County Bar Association, a non-profit membership corporation of the State of New Jersey, with an office for service of process at 174 Gregory Avenue in the City of Passaic, County of Passaic and State of New Jersey, and the plaintiff, Newton M. Roemer, residing at 424 Eighteenth Avenue in the City of Paterson, County of Passaic and State of New Jersey, and the plaintiff, William J. Marchese, residing at 15 Leslie Drive in the Township of Wayne, County of Passaic and State of New Jersey, say:

First Count

1. The plaintiff, Passaic County Bar Association, is a non-profit membership corporation, incorporated pursuant to Title 15 of the New Jersey Revised Statutes. All of its approximate 650 members are members in good standing of the New Jersey Bar, practicing or residing in the County of Passaic. Among the primary objects of the said Association are the promotion of the due and proper administration of justice and the advancement of the public welfare.

2. The plaintiff, Newton M. Roemer, is the President of the Passaic County Bar Association. He is a taxpayer in and resident of Passaic County. The plaintiff, William J. Marchese, is the Chairman of the duly constituted Special Committee on the Judicial Crisis of the Passaic County Bar Association. He is a taxpayer in and resident of Passaic County.

3. In accordance with the provisions of Article VI of the New Jersey Constitution as implemented by appropriate statutes enacted by the Legislature of New Jersey, there

are established or sitting within Passaic County courts of civil jurisdiction including the Superior Court, the Passaic County Court, the Passaic County District Court, and the Juvenile and Domestic Relations Court of Passaic County. These several courts have been established as aforesaid for the use, benefit and protection of the residents of Passaic County and others properly resorting thereto, as well as for the use of the members of the corporate plaintiff including the individual plaintiffs herein both in their individual and professional capacities. The availability of resort to the protection and remedies of such courts in Passaic County is guaranteed to the residents of Passaic County and to the plaintiffs by Articles I and VI of the New Jersey Constitution and by the Constitution of the United States.

4. In accordance with law, the judges of the several courts referred to in Paragraph 3 are subject to assignment by the Assignment Judge of Passaic County and, upon appropriate assignment, are available for the hearing and disposition of civil litigated matters in Passaic County.

5. Since on or about June 1967 there have been vacancies in the several courts named in Paragraph 3 hereof.

6. For some time prior to June 1967 and ever since that time the volume of civil litigated matters awaiting trial and disposition in Passaic County has continued to increase, and at an accelerating rate of increase.

7. For some time prior to June 1967 and ever since that time the volume of litigated criminal matters awaiting trial and disposition in Passaic County has continued to increase, and at an accelerating rate of increase.

Appendix D

8. Since June 1967 the number of judges available in Passaic County for the hearing and disposition of civil litigated matters has diminished.

9. On or about June 27, 1969, Hon. John F. Crane, Assignment Judge of Passaic County, acting pursuant to the authority vested in him by the Chief Justice of the Supreme Court of New Jersey, announced the suspension of the civil trial calendar in Passaic County effective with the commencement of the September 1969 Term of Court. The Assignment Judge duly advised attorneys of record in pending civil actions that "Because of the shortage of judges and the demands of other classes of litigation such as criminal and Juvenile and Domestic Relations, . . .", he had taken such action. The form of his communication is annexed hereto and designated as Schedule A and made a part hereof.

10. The suspension of trials of civil causes in Passaic County is in substantial part the result of a failure by the defendant, Hon. Richard J. Hughes, to make timely nominations and appointments for judicial positions in Passaic County and the failure of the defendants, the President and Members of the Senate of New Jersey, to take timely action with respect to such nominations when made.

11. On or about April of 1969, at a time when an emergency existed in Passaic County with respect to the trial of civil causes, the defendant, Hon. Richard J. Hughes, nominated and appointed Irving I. Rubin, Esq. to be a Judge of the Passaic County Court, Murray L. Laiks, Esq. to be a Judge of the Passaic County District Court,

and Peter Ciolino, Esq. to be a Judge of the Juvenile and Domestic Relations Court of Passaic County. The judicial vacancies for which these nominations and appointments were made had existed for varying and extended periods of time prior to the making of such nominations.

12. In addition to the three judicial vacancies referred to in Paragraph 11 above, the prospect of a fourth judicil vacancy, as well as the occurrence of that vacancy on August 1, 1969, have been matters of public knowledge. On or about August 1, 1969, a judicial vacancy did occur in the Passaic County Court by reason of the mandatory retirement by reason of age of the Hon. Harry Nadell. On August 6, 1969, defendant, Hon. Richard J. Hughes, nominated and appointed the Hon. William J. Woods, who is a Judge of the Passaic County District Court, to succeed the Hon. Harry Nadell as Judge of the Passaic County Court. Hon. Richard J. Hughes has made no nomination or appointment of any person to succeed the Hon. William J. Woods as a Judge of the Passaic County District Court. Plaintiffs aver, without disparaging the meritorious nature of the nomination and appointment of the Hon. William J. Woods to be a member of the Passaic County Court, that the elevation of the Hon. William J. Woods to the Passaic County Court from the Passaic County District Court will not increase the total number of judges in Passaic County available for assignment by the Assignment Judge of Passaic County for the hearing and disposition of civil causes.

13. In addition to the four currently existing judicial vacancies in Passaic County referred to in Paragraphs

11 and 12 above, the temporary disability or partial disability of the other members of the judiciary ordinarily sitting in Passaic County is a matter of public knowledge.

14. The fact of the emergency in the trial of civil causes in Passaic County was and is known to the defendants, the President and Members of the Senate of New Jersey and the Governor of New Jersey.

15. At all times since January 14, 1969, the 1969 Senate of New Jersey has been in regular session (though not regularly convened), subject only to interim adjournments in accordance with the constitutional restrictions specified in Article IV, Sec. IV, Paragraph 5 of the Constitution of New Jersey, and subject to being convened at any time by the defendant, Hon. Richard J. Hughes, in accordance with Article V, Sec. I, Paragraph 12 of the Constitution of New Jersey.

16. The defendants have from time to time acknowledged the existence of a judicial crisis in Passaic County and have exhibited an awareness of an emergency affecting the administration of civil justice in Passaic County.

17. The defendant, Governor of New Jersey, is charged, in accordance with Article VI, Sec. VI, Paragraph 1 of the Constitution of New Jersey, with a mandatory duty to nominate and appoint, with the advice and consent of the Senate, the Judges of the Courts referred to in Paragraph 3 above.

18. The defendants, the President and Members of the New Jersey Senate, are mandatorily charged by Article VI, Sec. VI, Paragraph 1 of the New Jersey Constitution to

act upon such Executive nominations and appointments to the end that such nominations and appointments may be seasonably approved or disapproved.

19. The defendant, the Governor of New Jersey, may not lawfully refrain from nominating and appointing persons to fill vacant judicial offices.

20. The defendants, the President and Members of the Senate of New Jersey, may not lawfully refuse to act upon or refrain from taking action upon the nomination and appointment by the Executive of persons to fill vacant judicial offices.

21. By reason of the existing judicial crisis in Passaic County, the President and Members of the Senate of New Jersey are constitutionally obliged and required to act forthwith upon such nominations and appointments to fill vacant judicial offices in Passaic County such as are now pending before them, whether by way of approval or disapproval. Unless such action is taken, certain fundamental rights of the residents of Passaic County, including the plaintiffs, will be impaired or destroyed.

22. By reason of the existing judicial crisis in Passaic County, the defendant, the Hon. Richard J. Hughes, is constitutionally obliged and required to act forthwith to nominate and appoint a person or persons to fill vacant judicial offices in Passaic County, both in that instance in which he has not acted thus far to do so and in those instances in which this Court may determine that there is no subsisting nomination or appointment pending before the Senate of New Jersey. Unless such action is taken, certain fundamental rights of the residents of Passaic

County, including the plaintiffs, will be impaired or destroyed.

23. The failure and refusal of the defendants, the President and Members of the Senate of New Jersey, to discharge their constitutionally mandated obligations as aforesaid and their participation in a so-called "deadlock" with respect to the accomplishment of judicial appointments for judicial offices in Passaic County constituted and continues to constitute an unconstitutional exercise by the legislative branch of powers not residing in that branch and an unconstitutional infringement upon the power and authority of the judicial branch tending toward the disruption of the judicial branch of the government of New Jersey and of the County of Passaic to the detriment of that branch and to the detriment of the residents of Passaic County and of New Jersey, including the plaintiffs.

24. The action of the defendant, Hon. Richard J. Hughes in failing to make prompt and seasonable nomination and appointment of judicial officers and, in the instant circumstance, his failure to make prompt nomination and appointment of a judicial officer for an existing judicial vacancy in Passaic County constituted and does constitute an unconstitutional exercise by the Executive branch of powers not residing in that branch and an unconstitutional infringement upon the power and authority of the judicial branch which has disrupted the judicial branch of the government of New Jersey and of the County of Passaic to the detriment of that branch and to the detriment of the residents of Passaic County and of New Jersey, including the plaintiffs.

Appendix D

25. The plaintiffs and other residents and taxpayers of Passaic County, including litigants, lawyers and all who come or reside within the County and are thereby entitled to the protection of and resort to the law have been deprived of rights and privileges as are accorded to such persons in other counties of New Jersey; have been deprived of a forum in which their rights may be determined; have been deprived of their right to have their claims and claims against them adjudicated; have been deprived of their right to represent clients in proper forums; have been deprived of their right to be represented by attorneys in proper forums; have been damaged and will be further irreparably damaged unless appropriate and prompt relief is granted.

26. The actions and activities of the defendants as aforesaid have deprived the residents of Passaic County, including the plaintiffs, of the equal protection of the law, of their rights as guaranteed by the Constitution of New Jersey, Articles I and VI, and as further guaranteed by the Constitution of the United States, Amendment XIV.

WHEREFORE, the plaintiffs pray that this Court may render judgment:

1. Declaring the status of nominations and appointments for judicial office in Passaic County heretofore made by the defendant, Hon. Richard J. Hughes, and with respect to which the defendants, the President and Members of the New Jersey Senate, have not acted affirmatively to approve or disapprove.

2. Ordering the defendant, the Hon. Richard J. Hughes, Governor of New Jersey, to forthwith:

Appendix D

(a) Nominate and appoint a person or persons to fill such judicial office or offices as may be determined to be vacant and with respect to which there is no pending nomination or appointment pending in the Senate of New Jersey.

(b) Convene the Senate of New Jersey for the purpose of receiving and acting upon nominations and appointments for judicial office in Passaic County.

3. Ordering the defendants, the President and Members of the Senate of New Jersey to forthwith act upon nominations and appointments for judicial office in Passaic County; whether by way of approval or disapproval.

Second Count

1. Plaintiffs repeat all of the allegations of the First Count of this Complaint as though set forth here at length and verbatim.

2. The failure of the defendants, the President and Members of the Senate of New Jersey to act, whether by way of approval or disapproval, upon the nominations referred to in Paragraph 11 of the First Count is based upon a custom of the Senate of New Jersey known as "Senatorial Courtesy."

3. The custom known as "Senatorial Courtesy" is one whereby the nomination of a nominee may not be acted upon or, in the alternative, may not be favorably acted upon unless all of the State Senators representing the County of residence of the nominee approve such nomination.

Appendix I)

4. The Senate failed to act upon the said nominations at the behest of one or more of the home county Senators.

5. The use of the custom of "Senatorial Courtesy" in the manner aforesaid was arbitrary, capricious and had no relationship to the qualifications or integrity of the nominees or any one of them and was illegal and unconstitutional.

6. The use of the custom of "Senatorial Courtesy" had no reasonable relationship to and is in violation of the authority of the Senate of New Jersey to determine the rules of its proceedings in accordance with Article IV, Section IV, Paragraph 3 of the New Jersey Constitution.

7. The custom of "Senatorial Courtesy" to frustrate or reject a nomination violates the rights of the plaintiff as guaranteed by the New Jersey Constitution, Article I, and the Constitution of the United States, Article XIV.

8. The custom of "Senatorial Courtesy" has no reasonable relationship to the powers granted the Senate of New Jersey to "advise and consent" as set forth in Article VI, Section VI, Paragraph 1 of the New Jersey Constitution.

WHEREFORE, plaintiffs pray that:

1. This Court adjudge that the action of the Senate of the State of New Jersey in this matter, in using the custom of "Senatorial Courtesy" as practiced by the present forty (40) Senators of New Jersey to frustrate or defeat nominations to judicial office made by the Governor of New Jersey is illegal, unconstitutional and void.

Appendix D

2. This Court define the "advice and consent" clause as contained in the New Jersey Constitution, Article VI, Section VI, Paragraph 1.

3. This Court order the Senate of New Jersey to cease and desist from using the custom of "Senatorial Courtesy" as a substitute for the constitutional requirements of "advice and consent" contained in the New Jersey Constitution, Article VI, Section VI, Paragraph 1.

Tenth County

1. Plaintiffs repeat all of the allegations of the First and Second Counts of this Complaint as though set forth here at length and verbatim.

2. As a result of the actions of the defendants, the President and Members of the Senate of New Jersey, and of the defendant, the Governor of New Jersey, the administration of justice and the lawful and constitutional activities of the judiciary have been hampered, impeded and, in the instance of civil litigation in Passaic County, substantially destroyed.

3. The Executive and Legislative branches of the Government of New Jersey are not constitutionally vested with power to destroy or impede the Judicial branch, but to the contrary have an obligation and duty to preserve the operation of the Judicial branch.

4. The Judicial branch has the power and the duty to preserve and protect its functions.

Wherefore, the plaintiffs pray that the Court exercise its constitutional power to protect itself and to secure for

Appendix B

the citizens of Passaic County a Judicial branch administered by Judicial officers through its judgment or order, whether in form as sought in one or more of the prayers stated in the First and Second Counts of this Complaint or in form of such other relief as the Court may deem appropriate.

Howard Stern
Howard Stern
Attorney for Plaintiffs

Of Counsel:

Howard L. Azner
Joseph D. J. Gormley
Joseph J. Salmon

Schedule A

Superior Court of New Jersey

Chambers of
John F. Clarke
Assignment Judge

Court House
Paterson, New Jersey

Date

Addressee Attorney

Title of Cause

Dear Sir:

The trial of the above entitled case which has been scheduled for the indicated date will be adjourned without date.

Appendix D

Because of the shortage of judges and the demands of other classes of litigations such as criminal and Juvenile and Domestic Relations, it has been necessary to suspend the trial of civil cases in the Law Division of the Superior and County Courts in this vicinage. When additional judges are confirmed civil cases will once again be scheduled for trial. At that time you will receive notice of a trial date.

Yours very truly,

JOHN F. CRANE
John F. Crane
A.J.S.C.

[redacted]

[redacted]

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

[redacted]

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STATEMENT OF FACTS

The full procedural history of this case is significant and is not fully reported in the petition heretofore filed in this court. The salient procedural facts are the following:

On August 8, 1969 plaintiffs filed their complaint seeking a declaratory judgment and requesting mandamus and injunctive relief. The subject matter of the controversy was certain unfilled judicial positions in the County of Passaic. The suit sought to compel the appointment of judges by declaring certain legislative practices of the New Jersey Senate unconstitutional. In brief the complaint concerned itself with or examination of the practice of "Senatorial courtesy" whereby in exercising its power of advice and consent the members of the New Jersey Senate would defer to the opposition of a Senator who disapproved of a judicial nominee slated to sit in that Senator's county.

All parties to the suit moved for summary judgment and on December 22, 1969 Hon. Worral Mountain, J.S.C. dismissed the complaint essentially for the reason that the subject matter of the suit did not present a justiciable controversy.

The plaintiffs thereafter filed a notice of appeal in the Superior Court - Appellate Division. While the matter lay pending unheard, the plaintiffs moved in the New Jersey Supreme Court for certification. The Supreme Court refused to certify the matter and the merits of the appeal were left for the Superior Court - Appellate Division. As is customary no reason was given by the Supreme Court for its refusal to certify the matter.

Thereafter certain factual developments rendered the subject matter of the litigation moot. A new Governor

was elected and a new legislative session commenced while the matter was pending in the Appellate Division. New judicial nominations were made and confirmed and Passaic County received its full complement of judges. A moratorium on the trial of civil cases was lifted in April of 1970 after having been in effect for about nine months. It had been this last factor which prompted institution of the suit.

Because of these new factors the defendants moved to dismiss the appeal as being moot. The motion was briefed by both sides but no oral argument was held as is the practice with motions in the Appellate Division. The Appellate Division granted the motion to dismiss the appeal without opinion. Plaintiffs then filed a notice of appeal in the Supreme Court of New Jersey asserting a constitutional question which would afford a hearing "as of right". The appeal, however, was from the dismissal by the Appellate Division because of the mootness of the controversy. The Supreme Court had once before decided not to certify the merits of the cause prior to it having become moot. For these reasons the defendants once more moved to dismiss the appeal – this time on the ground that the plaintiffs were not presenting a constitutional issue upon which they would have a right to appeal; rather they were appealing a non-constitutional issue, viz, the propriety of the Appellate Division's dismissal on grounds of mootness.

The New Jersey Supreme Court granted defendants' motion to dismiss the notice of appeal on October 7, 1970. This petition for a writ of certiorari filed in the United States Supreme Court followed on January 2, 1971.

ARGUMENT

The instant case is not an appropriate vehicle for presenting the important constitutional issues sought by the Petitioners for review.

The courts of the State of New Jersey have been on the vanguard of those courts which have fought judicially for legislative reform and responsiveness. Indeed the landmark case of *Baker v. Carr*, 369 U.S. 186 (1962) was anticipated by a prophetic State Supreme Court in *Asbury Park Press, Inc. v. Wooley*, 33 N.J. 1 (1960). Thus no abdication of judicial responsibilities can explain the reason for the disposition of the instant case. Rather the reason may be found in the disappearance of the controversy which prompted the suit. It will be remembered that after a determination at the trial level the Governor and Legislature acted in such fashion as to fill the judicial vacancies. After those events no relief could be given the plaintiffs other than an advisory opinion. In New Jersey as in the courts of the United States the role of the judiciary is to decide "cases" or "controversies". As applied to the relief presently being sought it is necessary that the issues presented take place in the context of a "case" since the appellate jurisdiction of this court is so limited by the United States Constitution, Article III, Section II. As a result of this constitutional limitation the courts have followed a self-imposed doctrine of "mootness". In *Powell v. McCormack*, 89 S. Ct. 1944 (1969) the court said,

> "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." 89 S. Ct. at p. 1951.

In *Powell* it was determined that the case had not become moot since the legislative body continued to withhold a salary of the congressman. But for that fact, it is clear there would have been no current issues justifying judicial intervention. However there are absolutely no remnants of the original case or controversy remaining to be resolved in the case at bar. All that remains is the belief of petitioners that at another time and in another place the legislative practice complained of may result in a delay in filling judicial posts. There is nothing in the record below to support this belief. Of even greater importance, there is nothing in the Constitution which can confer appellate jurisdication over fears of anticipated events when those fears are not embodied in a "case or controversy."

Where a petitioner seeks to raise issues of substantial constitutional importance this court has traditionally decided such issues only in cases that present them in an adequate manner. Circumstances which occur during the pendency of a case may remove the attractiveness of a case as a vehicle for presenting an issue otherwise appropriate for determination. As recently as two months ago this Court had occasion to dismiss a writ of certiorari as improvidently granted after the case had been briefed and argued. The language of *Piccirillo v. New York*, 91 S. Ct. 520 (1971) bears repeating.

> After considering the briefs and oral arguments of the parties on this writ, we have reached the the conclusion that the decision of the New York Court of Appeals in *Gold v. Menna*, 25 N.Y.2d 475, 307 N.Y.S.2d 33, 225 N.E.2d 235 (1969), which makes clear that transactional immunity is required in New York and also indicates that such court's earlier decision in the case before us, *People v. LaBello and Piccirillo*, 24 N.Y.2d 598, 301 N.Y.S.2d

544, 249 N.E.2d 412 (1969), may have rested on that premise, makes this case an inappropriate vehicle for deciding a question of such far-reaching importance.

> With the intervening decision in *Gold*, no controversy any longer exists between the parties as to the question which impelled us to grant the writ: whether, in the circumstances involved in this case, *Piccirillo* was entitled to "use" or "transactional" immunity. While it is true that, technically speaking, issues remain in the case concerning the kind of immunity required by federal law and, if it be "transactional" rather than "use" immunity in such a case as this, the proper scope of such immunity, both issues arise only against the sterile background of agreement between the parties that *Piccirillo* is entitled to "transactional" immunity under state law. Thus, our determination upon the fundamental constitutional question underlying this case would be in no sense necessary to its resolution in this instance. 89 S. Ct. at p. 521.

A case which seeks to disturb the relationship between the executive and the legislature and which further seeks to interfere with the internal workings of that legislature is obviously of a sensitive nature. Indeed, it is of such sensitivity that the trial court, in a careful analytical manner found that even *Baker v. Carr*, *supra* did not mandate interference into this particular political question. When the issues are of such importance it is not asking too much to expect them to be decided only in the context of a "live" controversy. But to reach the merits of this case would be to unnecessarily create tension between the State and Federal courts and between the executive, legislative and judicial branches. Surely such is not the hallmark of a healthy federalism.

There is an additional reason why this court should not entertain the issues presented in this case. The petitioners contend that certain practices of the legislature regarding adjournments operate to divest the Governor of his power to make interim appointments. The practice is claimed to be violative of Article V, Sec. 1, Par. 13 of the New Jersey Constitution. Clearly this issue is one that the federal courts ought to abstain from deciding until such time as a New Jersey court has interpreted its own Constitution.

Mr. Justice Frankfurter expressed this doctrine of abstention in *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101 (1944) when he said,

> If there is one doctine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality — here the distribution of the taxing power as between the State and the Nation — unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. *Railroad Commission v. Pullman Co., supra; Chicago v. Fieldcrest Dairies*, 316 U.S. 168; *In re Central R. Co. of New Jersey*, 138 F.2d 633. See also *Burford v. Sun Oil Co.*, 319 U.S. 315; *Meredith v. Winter Haven*, 320 U.S. 228, 235; *Green v. Phillips Petroleum Co.*, 119 F.2d 466; *Findley v. Odland*, 127 F.2d 948; *United States v. 150.29 Acres of Land*, 135 F.2d 878. Avoidance of such guess-work, by holding the litigation in the federal courts until definite deter-

minations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.

In the case at bar petitioners seek a federal interpretation that the New Jersey Legislature is in violation of the New Jersey Constitution by virtue of an internal rule of practice. Nothing would be more inappropriate than to have this issue decided for the first time by this court.

Along this same line the defendants in the trial court raised the issue of plaintiffs' failure to join an indispensable party. The issue was never decided since the trial court dismissed the suit for want of a justiciable controversy. However should this court reach the merits of this case that prior unheard defense would be in need of decision. It is by its nature one for decision by the state courts. The New Jersey Constitution, Article VI, Sec. 7, Par. 2 authorizes the Chief Justice to assign Superior Court judges to the various Divisions and Parts of the Superior Court and permits him to, "from time to time transfer judges from one assignment to another, as need appears." Similar flexibility is afforded by various legislative enactments (*N.J.S.* 2A:8-11, *N.J.S.* 2A:3-19.1 and *N.J.S.* 2A:3-20) as well as by Court Rule 1:33-3(b).

No showing was ever made that judicial manpower was unavailable to enable civil trials to take place in Passaic County during the nine month period of suspension. Indeed before a wholesale attack on the Legislature was undertaken petitioners might well have sought relief in a purely informal or administrative way by applying for judicial reinforcement through the office of the Chief Justice. Their failure to join the Chief Justice, who had the power to rectify the so-called crisis situation, was clearly the failure to join a party indispensable to a proper

resolution of the litigation. However this forum is hardly the place to litigate such an issue and the absence of a record on this issue could not result in an adequate presentation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari be denied.

WILLIAM E. McGLYNN
Counsel for Respondents,
Frank X. McDermott and Members
of the Senate of the State of
New Jersey
605 Broad Street
Newark, New Jersey 07102

LOUIS A. RUPPRECHT
On the Brief